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V.M., Appellant)	
)	
and)	Docket No. 18-1800
)	Issued: April 23, 2019
ENVIRONMENTAL PROTECTION AGENCY,)	
OFFICE OF ENFORCEMENT &)	
COMPLIANCE ASSURANCE, St. Louis, MO,)	
Employer)	
)	

Case Submitted on the Record

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

² The Board notes that counsel did not appeal a nonmerit OWCP decision dated September 13, 2018 which denied appellant's request for reconsideration of the May 1, 2018 merit OWCP decision. He appealed only the merit OWCP decision dated May 1, 2018 and explicitly indicated that the Board could "disregard" the September 13, 2018 nonmerit decision. Therefore the Board will not consider this decision on appeal.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than four percent monaural (right ear) hearing loss, for which he previously received a schedule award.

FACTUAL HISTORY

On June 20, 2017 appellant, then a 57-year-old criminal investigator, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss and tinnitus as a result of employment-related noise exposure. He noted that he first became aware of his condition on November 10, 1999 and realized that it resulted from his federal employment on December 17, 1999. Appellant retired in January 2013.

By development letter dated June 21, 2017, OWCP informed appellant that the evidence submitted was insufficient to establish the claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP received appellant's response to the questionnaire and copies of various audiograms and hearing evaluations administered by the employing establishment from April 21, 1993 to January 7, 2000. Among them was a Tinnitus Handicap Inventory (THI), dated March 12, 2017.

On September 13, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. Richard L. Barnes, a Board-certified otolaryngologist, for a second opinion evaluation.

In an October 11, 2017 report, Dr. Barnes reviewed appellant's history of noise exposure at work and provided examination findings. He performed an otologic evaluation and audiometric testing was obtained on his behalf. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed the following: right ear 10, 15, 25, and 60 decibels (dBs); and left ear 5, 10, 25, and 25 dBs. Dr. Barnes diagnosed noise-induced sensorineural hearing loss. He indicated that the findings were consistent with a noise-induced sensorineural hearing loss greater than would be expected due to presbycusis.

By decision dated October 17, 2017, OWCP accepted the claim for binaural sensorineural hearing loss.

In an October 24, 2017 report, Dr. Jeffrey M. Israel, a Board-certified otolaryngologist and district medical adviser (DMA), noted that the results of the most recent audiogram, dated October 11, 2017, were valid and representative of appellant's hearing sensitivity. Based on this study, he calculated 3.75 percent right monaural loss and 0 percent left monaural loss, which

³ 5 U.S.C. § 8101 *et seq.*

represented 0.6 percent binaural loss. Dr. Israel found that appellant had reached maximum medical improvement (MMI) as of October 11, 2017, which was the date of his latest audiogram.

On December 19, 2017 appellant filed a claim for a schedule award (Form CA-7).

By decision dated February 8, 2018, OWCP granted appellant a schedule award for four percent monaural hearing loss, right. The award covered a period of 2.08 weeks from October 11 through 25, 2017. OWCP computed appellant's weekly pay at \$2,556.94 based on the 75 percent augmented rate for employees with dependents, totaling \$3,988.83.

On March 9, 2018 appellant, through counsel, requested reconsideration of the February 8, 2018 OWCP decision arguing that he also had tinnitus and this condition was not considered or included in the impairment rating.

By decision dated May 1, 2018, OWCP denied modification of its February 1, 2018 decision, finding that the evidence of record was insufficient to establish that appellant has ratable binaural hearing loss and therefore, a schedule award for tinnitus was not payable.

LEGAL PRECEDENT

A claimant seeking compensation under FECA⁴ has the burden of proof to establish the essential elements of his or her claim.⁵ With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.⁶

The schedule award provisions of FECA⁷ and its implementing regulations⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical

⁴ *Supra* note 3.

⁵ *John W. Montoya*, 54 ECAB 306 (2003).

⁶ *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁹ has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.¹⁰

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are added up and averaged.¹¹ Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions.¹² The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹³

The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.¹⁴ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁵ The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number.¹⁶ OWCP's procedures provide that percentages should not be rounded until the final percent for award purposes is obtained. Fractions should be rounded down from .49 and up from .50.¹⁷

If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, enjoyment of quiet recreation and emotional well being, up to five percent may be added to measurable binaural hearing impairment.¹⁸ A schedule award for tinnitus is not payable unless the medical evidence establishes that the condition caused or contributed to a ratable hearing loss.¹⁹

⁹ A.M.A., *Guides* (6th ed. 2009).

¹⁰ See *J.W.*, Docket No. 17-1339 (issued August 21, 2018); *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

¹¹ A.M.A., *Guides* 250.

¹² *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *J.W.*, *supra* note 10; *C.D.*, *supra* note 12.

¹⁶ *P.L.*, Docket No. 17-0355 (issued June 27, 2018).

¹⁷ *C.D.*, *supra* note 12; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4 (January 2010).

¹⁸ A.M.A., *Guides* 249.

¹⁹ See *Charles H. Potter*, 39 ECAB 645 (1988).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than four percent monaural hearing loss, for which he previously received a schedule award.

OWCP's medical adviser, Dr. Israel, applied OWCP's standardized procedures to Dr. Barnes' October 11, 2017 audiogram when he calculated 3.75 percent right monaural loss and zero percent left monaural loss, which represented 0.6 percent binaural loss. His report, therefore, established that, after rounding,²⁰ appellant was entitled to a schedule award for four percent monaural (right ear) hearing loss.²¹ The Board finds that Dr. Israel properly applied OWCP's standardized procedures to Dr. Barnes' October 11, 2017 audiogram, which recorded frequency levels at the 500, 1,000, 2,000, and 3,000 Hz and revealed decibel losses of 10, 15, 25, and 60 respectively in the right ear, for total hearing loss of 110 dBs in the right ear and 5, 10, 25, and 25 decibel losses respectively in the left ear, for total hearing loss of 65 dBs in the left ear. Dr. Israel then followed the established procedures and divided these totals by 4, which resulted in an average loss of 27.5 dBs in the right ear and 16.25 dBs in the left ear. He then subtracted the fence of 25 dBs to equal 2.5 dBs in the right and 0 dBs in the left. Dr. Israel then multiplied these amounts by the established factor of 1.5 to result in 3.75 percent monaural loss for the right ear and 0 percent monaural loss for the left ear. The report, therefore, properly established that appellant was entitled to a schedule award for four percent right ear hearing loss.²²

The Board finds that there is no current medical evidence of record supporting a ratable hearing loss greater than the four percent monaural hearing loss (right ear) previously awarded.

The Board, therefore, finds that appellant is not entitled to a schedule award for tinnitus.²³ FECA does not list tinnitus in the schedule of eligible members, organs, or functions of the body.²⁴ Consequently, no claimant may directly receive a schedule award for tinnitus. Hearing loss is a covered function of the body, so if tinnitus contributes to a ratable loss of hearing, a claimant's schedule award will reflect that contribution. The A.M.A., *Guides* provides that, if tinnitus interferes with activities of daily living, up to five percent may be added to a measurable binaural hearing impairment.²⁵ The Board has repeatedly held, however, that there is no basis for paying a schedule award for a condition such as tinnitus unless the evidence establishes that the condition caused or contributed to a ratable hearing loss.

²⁰ The Board notes OWCP's policy to round the calculated percentage of impairment to the nearest whole number. See *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004). See also Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 3.700.3(b) (January 2010).

²¹ See *S.G.*, 58 ECAB 383 (2007).

²² See *J.W.*, *supra* note 10.

²³ *R.R.*, Docket No. 12-1840 (issued February 14, 2013).

²⁴ 5 U.S.C. § 8107(c).

²⁵ A.M.A., *Guides* 249.

A schedule award provides for payment of compensation for a specific number of weeks as prescribed by the statute.²⁶ Section 8107(c)(13)(B) of FECA provides that for 100 percent loss of hearing of one ear, a claimant is entitled to 52 weeks' compensation.²⁷ As appellant sustained four percent monaural hearing loss, he is entitled to 2.08 weeks' compensation, which is what OWCP awarded.²⁸

Appellant, through counsel, contends on appeal that OWCP failed to consider his tinnitus condition in its schedule award decision. Regarding tinnitus, the A.M.A., *Guides* allows for compensation of up to five percent for it in the presence of measurable hearing loss if it impacts the ability to perform activities of daily living. Although appellant's Form CA-2, July 6, 2017 response to OWCP's questionnaire, and March 12, 2017 THI discuss tinnitus, the evidence of record, including audiograms from the employing establish, does not establish a diagnosis of tinnitus. Further, while counsel referenced that the Form CA-1332 used by Dr. Barnes failed to solicit information regarding tinnitus, the use of and content of this form is beyond the purview of the Board.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than four percent monaural (right ear) hearing loss, for which he previously received a schedule award.

²⁶ 5 U.S.C. § 8107.

²⁷ *Id.* at § 8107(c)(13)(B).

²⁸ The Board notes OWCP calculated 2.08 weeks of \$1,917.11 in weekly compensation at \$3,988.83. The correct calculation is \$3,988.8368. While OWCP cannot pay fractions of a cent, its decision not to round up to \$3,988.84 is harmless error.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board